In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 664

SIMON STALLSWORTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 64–69) is reported at 193 F. 2d 870.

JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 1951, and a petition for a rehearing was denied on February 19, 1952 (R. 70–71). The petition for a writ of certiorari was filed on March 19, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether evidence of petitioner's possession of marihuana without the required statutory order form was sufficient to prove venue of the illegal transfer of the drug.

2. Whether there was sufficient evidence of reasonable notice and demand by a deputy collector upon petitioner for the production of the order form required for the legal transfer of marihuana.

3. Whether there was sufficient evidence to prove that the substance found in petitioner's possession was marihuana within the statutory definition.

4. Whether petitioner's counsel was unduly limited in the scope of his cross-examination of a chemist testifying as to the nature of the marihuana.

STATUTES INVOLVED

26 U. S. C. 2553 (a) (53 Stat. 271, as amended, 58 Stat. 721) provides:

> It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package contain-

ing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

26 U. S. C. 2591 (a) and (d) (53 Stat. 280) provides:

> (a) It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 3230 and 3231, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary.
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> * * * * *
>
> (d) Each such order form sold by a collector shall be prepared by him and shall include an original and two copies, any one of which shall be admissible in evidence as an original. * * * The copy given to the purchaser by the collector shall be retained by the purchaser and preserved for a period of two years so as to be readily accessible to inspection by any officer, agent, or employee mentioned in section 2595. * * *

26 U. S. C. 2593 (a) (53 Stat. 281) provides:

> (a) It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 2590 (a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any

person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 2590 (a).

26 U. S. C. 2597 (53 Stat. 282) provides:

It shall not be necessary to negative any exemptions set forth in this subchapter or part VI of subchapter A of chapter 27 in any complaint, information, indictment, or other writ or proceeding laid or brought under this subchapter or part VI of subchapter A of chapter 27 and the burden of proof of any such exemption shall be upon the defendant. In the absence of the production of evidence by the defendant that he has complied with the provisions of section 3231 relating to registration or that he has complied with the provisions of section 2591 relating to order forms, he shall be presumed not to have complied with such provisions of such sections, as the case may be.

26 U. S. C. 3238 (b) (53 Stat. 387) provides:

(b) The term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant, and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not in-

clude the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

STATEMENT

Petitioner was tried under an indictment in the United States District Court for the Northern District of Illinois charging him as a transferee of a quantity of marihuana subject to payment of the tax imposed by 26 U. S. C. 2590 (a), and with having unlawfully obtained the marihuana without having paid the tax in violation of 26 U. S. C. 2593 (a) (R. 2). He was found guilty and sentenced to imprisonment for two years (R. 53–55). On appeal, the judgment was unanimously affirmed (R. 55–56, 70).

The evidence adduced at the trial may be summarized as follows:

On the evening of August 25, 1950, three federal narcotics agents were following petitioner, who was suspected of violating the narcotics laws. After petitioner parked his automobile in front of 343 East 47th Street in Chicago, Illinois, and started to talk to another person on the street, one of the agents informed petitioner that he had a warrant to search his automobile.

Although petitioner at first denied that the automobile was his, the agents were able to open the car with his key. A paper bag containing marihuana was found in the car. The marihuana was given to a government chemist for analysis, and the bag was delivered to a government fingerprint expert for examination (R. 7–11, 13–15).

On August 26, petitioner was turned over to the city authorities and a complaint was filed against him (R. 12, 16). On August 29, after petitioner left the municipal court, on the tenth floor of the police station, he was taken into custody by federal agents and arraigned on the federal charge before a United States Commissioner on that same date (R. 15, 18). A federal narcotics agent appeared before the municipal judge on August 29 at which time petitioner's municipal case was continued to August 31, when it was dismissed on the motion of the agent (R. 16, 17).

On August 29, in the corridor on the tenth floor of the police station, in the presence of federal narcotics agents, petitioner was asked by the deputy collector if he could produce an order form required by section 2591 (d) of Title 26 of the United States Code and petitioner replied, "No." From that time up until April 9, 1951, the day the trial began (R. 5), the deputy collector had never received from petitioner the required order form (R. 19–21, 22).

A government chemist who, in his previous experience, had made several thousand analyses of materials for the purpose of determining whether or not they were marihuana, testified that the substance taken from the paper bag found in petitioner's automobile was marihuana, being a green, flaky substance containing cystolith hairs. It contained leafy tops, and a material other than the bare stalk of the plant, Cannabis sativa, and other than the seeds, stems, and fibers of that plant (R. 28, 30, 42). Four separate chemical tests corroborated the microscopic physical examination disclosing that the substance being tested was marihuana (R. 34–35, 43).

A government fingerprint expert testified that petitioner's right ring fingerprint, taken the day after he was first arrested (R. 45), was identical with the corresponding print on the paper bag found in petitioner's automobile (R. 48-49).

ARGUMENT

1. There is no merit in petitioner's principal contention that, since the Government did not offer direct evidence as to the place where the marihuana was transferred to him, there was a failure to prove venue, so that the court was without jurisdiction (Pet. 9–14).

The presumption of guilt arising from the possession of unstamped drug packages, under 26 U. S. C. 2553 (a) (*supra,* pp. 2–3), is similar to the presumption of guilt flowing from the

possession of marihuana, absent the required order form, under 26 U. S. C. 2593 (a) (*supra*, pp. 3–4) (R. 66, Pet. 11). In cases arising under what is now 26 U. S. C. 2553 (a), it has been uniformly held that the possession of the proscribed drugs constitutes prima facie evidence, not only of illegal purchase, but of venue. *Casey* v. *United States*, 276 U. S. 413, 417–418; *United States* v. *Pisano*, 193 F. 2d 355, 360 (C. A. 7); *United States* v. *Chiarelli*, 192 F. 2d 528, 532 (C. A. 7), certiorari denied, 342 U. S. 913; *Anderson* v. *United States*, 189 F. 2d 202, 204–205 (C. A. 6); *Frazier* v. *United States*, 163 F. 2d 817, 818 (C. A. D. C.), affirmed, 335 U. S. 497; *Acuna* v. *United States*, 74 F. 2d 359, 360 (C. A. 5); *Killian* v. *United States*, 29 F. 2d 455, 456 (C. A. D. C.).[1] The cases on which petitioner relies (Pet. 9–10, 12)[2] were disapproved and in effect overruled in *Casey* v. *United States*, *supra*, 276 U. S. at 417–418.

2. There was not, as petitioner contends (Pet. 14–18), a failure of proof under 26 U. S. C. 2593

[1] There is a similar result as to proof of venue arising from the presumption under 21 U. S. C. 174 (35 Stat. 614, as amended, 43 Stat. 657). *United States* v. *Pisano*, *supra*; *Mullaney* v. *United States*, 82 F. 2d 638, 641 (C. A. 9). See the Government's Brief in Opposition, p. 20, in *Stoppelli* v. *United States*, No. 264, O. T. 1950, certiorari denied, 340 U. S. 864.

[2] *De Bellis* v. *United States*, 22 F. 2d 948 (C. A. 7), certiorari denied, 276 U. S. 634; *De Moss* v. *United States*, 14 F. 2d 1021 (C. A. 7); *Brightman* v. *United States*, 7 F. 2d 532 (C. A. 8).

(a), as to the "reasonable notice and demand by the collector" for production of the order form for the transfer of marihuana, which he was required to have and to preserve under 26 U. S. C. 2591 (a) and (d) (*supra*, p. 3).

The court below was clearly correct in interpreting the word "notice" as requiring "only that the demand should be brought to the notice of the possessor of the marihuana so that he might be able to produce the order which would show his possession to be the result of a legal transfer to him" (R. 66). Cf. *United States* v. *Markham*, 191 F. 2d 936, 938 (C. A. 7). The statute does not particularize the precise form of the notice and demand, and does not require the deputy collector to identify himself (see Pet. 17) to the person involved before making the demand. When the deputy collector asked the petitioner, while in the custody of the federal narcotics agents, if he could produce the order form required by section 2591 (d) of Title 26, United States Code, his reply was, "No." There is no basis for the speculation (see Pet. 15) that petitioner did not know what was meant.[3] Hav-

[3] The fact that the deputy collector on cross-examination did not recall the number of the order form is immaterial, since, as the trial court pointed out, the "statute does not specify any form number" (R. 23). Neither is there here a situation similar to that in *Kalos* v. *United States*, 9 F. 2d 268, 271 (C. A. 8) (see Pet. 16), where the evidence was uncontradicted that the accused could not understand English.

ing just left the municipal court room after a hearing on a narcotics charge, and then being taken into custody by federal narcotics agents on the federal charge, petitioner must have known that the order form was related to narcotics. There is nothing in the record to show that he asked for a more detailed explanation as to the provisions of section 2591 (d) or that he consulted an attorney regarding this. If he had in his possession the required order form, there was ample time to produce it long before the trial of his case, some eight months later.

Not having produced evidence showing that he had obtained an order form as provided in section 2591, there was a presumption that petitioner had not complied with this section. 26 U. S. C. 2597 (*supra*, p. 4). The burden of proof was upon him to show that he had the required order blank, and not upon the Government to prove negatively that the marihuana found in his possession was not transferred to him pursuant to a written order on the blank required by section 2591. Cf. *United States* v. *Williams*, 161 F. 2d 835, 837 (C. A. 2); *Rossi* v. *United States*, 289 U. S. 89, 91.

3. Petitioner is in error in contending (Pet. 18–20) that the Government failed to prove that the marihuana was an illegal product within the definition given in 26 U. S. C. 3238 (b) (*supra*, pp. 4–5). The testimony of the government chemist was clearly sufficient. He stated that he ex-

amined a green, flaky substance containing cystolith hairs and leafy tops; and that it contained a material other than the seeds, stems, and fibers. Further, four chemical tests corroborated the microscopic physical examination showing that the substance tested was marihuana (R. 30, 34–35, 42, 43). Although the printed record does not contain the trial court's charge to the jury, the decision below discloses that, at the request of petitioner's counsel, the jury was required to find that the substance found in his possession was marihuana within the statutory definition.[4]

4. There was no undue limitation of the cross-examination of the government chemist by petitioner's counsel (Pet. 19–20). To the contrary, the trial court's latitude regarding this was "liberal," as the court below stated (R. 69). It was improper to ask the witness questions in the fields of botany and pharmacy, in neither of which he claimed to be an expert, and objections thereto were properly sustained (R. 41–42). The trial court, however, liberally overruled numerous government objections to extending the scope of the cross-examination (R. 31, 32, 36, 40). The fact that the chemist did not determine whether the marihuana was male or female, what part of the

[4] At a colloquy during the cross-examination of the government chemist, the government attorney made this invitation to petitioner's counsel: "If he has any experts who will come in and say it is not marihuana, let him bring them in" (R. 32). However, petitioner did not offer any such evidence.

world it came from, whether the seeds were sterilized, and whether the marihuana was mature (see Pet. 20), do not reach the basic question as to whether the substance was within the statutory definition.

CONCLUSION

No conflict of decisions or question of general importance is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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